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May 23, 2003

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Ex Parte Filing
MB Docket No. 02-277

Dear Ms. Dortch:

Enclosed for inclusion in the record of the above-captioned proceeding, and on behalf of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (the "Joint Commenters"), please find a copy of a document entitled "The Localism Red Herring."

This document is being submitted to emphasize to the Commission that none of justifications put forward by NASA/NAB warrant retention of the national television ownership cap (the "Cap"). In particular:

- The Localism Red Herring: NASA/NAB assert that owners and executives of affiliates are better judges of the entertainment programming that local viewers should be allowed to watch than are the viewers themselves.

  The Reality: While the concept of the paternalistic affiliate may have had some (questionable) validity 40 or 50 years ago, when viewers had only two or three video choices, there is no basis whatsoever for this usurpation of individual choice today, when consumers have nearly limitless video and other entertainment options.

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More fundamentally, NASA/NAB's localism argument would convert the current content-neutral ownership cap into a restriction uniquely applicable to O&Os. Since the evidence in the record of this proceeding no longer justifies an ownership cap on the basis of a group's size, NASA/NAB essentially urge the Commission to transform the Cap into a regulation that evaluates owners based on their identity. It is wholly inappropriate, however, to base a structural ownership regulation on the identity of a particular owner.

- A rule that uniquely restrains only one type of private owner, while promoting the economic interests of others, is highly suspect. Given that the evidence demonstrates conclusively that O&Os are superior to affiliates in the most important measure of localism – output of local news and public affairs programming – maintenance of the Cap would be arbitrary and capricious.

- Furthermore, a rule that evaluates one type of owner based on its allegedly inferior editorial judgment – the only remaining basis upon which NASA/NAB attempt to justify the Cap – raises a host of First Amendment implications. A rule focusing on a particular speaker would not be content-neutral and would not be entitled to the more lenient standard of review applicable to content-neutral regulations.

In short, there is no reason for the Commission to allow a structural ownership regulation to continue to hamstring one group of owners – networks – based on another group of owners' private belief that they know what is best for every consumer.

If you have any questions concerning this submission, please contact the undersigned.

Respectfully submitted,

John C. Quale

Enclosures

cc: Susan M. Eid
Stacy Robinson
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THE LOCALISM RED HERRING – OWNERS AND EXECUTIVES OF AFFILIATES ARE BETTER JUDGES OF THE ENTERTAINMENT PROGRAMMING THAT LOCAL VIEWERS SHOULD BE ALLOWED TO WATCH THAN ARE THE VIEWERS THEMSELVES

- NASA/NAB argue that the national television ownership cap (the "Cap") is necessary to preserve "localism." Although never defined with precision, localism as used by NASA/NAB apparently means responsiveness to local tastes and needs - particularly as to entertainment programming. According to NASA/NAB, affiliates are somehow more attuned to local needs than network owned-and-operated stations ("O&Os").[1]

The Reality: Consumers Today Can Turn to a Virtually Unlimited Number of Video Options In Lieu of Programming They Find to be Unacceptable

- **NASA/NAB's localism claims beg the question: Given that television consumers can instantly switch to numerous other video offerings, do local viewers need affiliates to serve as intermediaries, shielding them from network programming?**

- If a consumer in a local market finds a particular program to be unacceptable, that consumer can – and does – easily change the channel. Indeed, when viewers "vote" with their remote controls, they send networks the ultimate form of feedback: lower ratings. Programs that do not garner sizeable audience support -- particularly those programs that viewers find unsuitable – are quickly replaced.

    - Given the enormous variety of content options prevalent in the modern media marketplace, consumers literally have thousands of alternative choices to turn to if they do not want to watch a network program – they can select from a broad spectrum of programming ranging from family-friendly to programming suitable for more mature audiences.

    - From other over-the-air television channels to cable and satellite networks to radio to the Internet to home video and interactive entertainment, consumers have no shortage of alternatives when it comes to selecting appropriate content.[2]

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1 *See Ex Parte* Letter to the Commission, filed by the Network Affiliated Stations Alliance ("NASA") and the National Association of Broadcasters ("NAB"), May 9, 2003 ("*NASA/NAB Ex Parte*"), at 6.

2 *See* Opening Comments of the Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (the "Joint Commenters"), filed January 2, 2003, at 10-26.

- **While the concept of a paternalistic affiliate may have had some (questionable) validity 40 or 50 years ago, when viewers had only two or three video choices, there is no basis whatsoever for this usurpation of individual choice today, when consumers have nearly limitless video and other entertainment options.**

    - All television sets sold today contain a V Chip that allows parents to choose the programs their children can view. Cable and satellite set-top-boxes provide similar parental controls.

    - Consumers today require no special protection from programming that affiliate executives (but not thousands of local viewers) may find to be in questionable taste.

Affiliate Preemptions on Content Grounds Are In Fact Exceedingly Rare

- In any event, affiliates very rarely preempt for reasons of objectionable content and, when they do, they substitute nationally syndicated – not local – entertainment programming.

    - **In a study undertaken at the request of the Joint Commenters, Economists Incorporated demonstrated that in 2001, affiliates on average preempted *less than five minutes per year* of prime time network programming for reasons of content.[3] O&Os preempt even more rarely on content grounds since O&O management (unlike affiliates) participates in the program development process.**

    - Equally significant, the rare affiliate preemption for content does not prompt the affiliate to replace the ostensibly objectionable network show with additional local programming. Instead, the preempting affiliates typically air episodes of syndicated entertainment programs (which allows them to reap the benefits of network programming lead-in audiences while keeping 100 percent of the advertising revenue for themselves).

    - In addition, the networks often find alternative over-the-air television stations in the same market on which to air the supposedly unsuitable programming. In other words, local viewers usually are able to view the program despite the objections of local affiliate management.

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[3] *See Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, Economists Incorporated ("EI"), April 21, 2003 ("*Affiliate Clearances*") (submitted with the *Ex Parte* Letter to the Commission of the Joint Commenters, filed April 21, 2003), at 20; *see also Preemption By O&Os Compared to Affiliates*, EI Economic Study G, submitted with the Opening Comments of the Joint Commenters, January 2, 2003 ("*Study G*").

- **This tiny amount of content preemption is no basis for maintenance of structural ownership regulations that threaten the viability of over-the-air broadcasting by discouraging network investment.**

As Defined by NASA/NAB, There is Very Little "Local" In "Localism"

- Localism does ***not*** mean local ownership – NASA's members include large group owners headquartered in major metropolitan areas operating stations located throughout the United States.

- Localism does ***not*** mean local programming. On the rare occasion that an affiliate preempts an entertainment program on content grounds, it will likely substitute nationally syndicated programming.

- Localism does ***not*** mean better, more locally attuned station management. The Joint Commenters had challenged NASA/NAB's efforts to justify the Cap on the basis that affiliates are more effective at discerning local needs. The Joint Commenters demonstrated that O&O general managers are no less attuned than affiliate general managers to local needs.[4] **Even NASA/NAB and their economic consultants now concede that O&Os are equally integrated in, and equally capable of serving, local communities.**[5]

As "Localism" Is Defined by the Commission, Maintenance of the Cap Harms the Public Interest

- According to the FCC, production of local news and public affairs may be a key component of localism.[6] Indeed, the Commission emphasized in the *Notice* that it is "particularly interested in any clear correlation between the status of stations as affiliates or network-owned and the quantity of local news and public affairs [programming] produced by those stations."[7]

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4 *See, e.g., Ex Parte* Letter to the Commission, filed by the Joint Commenters on April 21, 2003, at Attachment 1.

5 *See NASA/NAB Ex Parte*, at 7; *see also Response to April 21 and May 2, 2003 Filings by Fox, NBC, and Viacom*, Marius Schwartz and Daniel R. Vincent, May 6, 2003 (submitted with the *NASA/NAB Ex Parte*), at 1 (noting that the authors do not rely on "a belief that affiliates have superior judgment than O&Os").

6 *See In Re 2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking (released September 23, 2002) ("*Notice*"), at ¶ 148.

7 *See id.*

- **First and foremost, the Joint Commenters have conclusively demonstrated *beyond any doubt* that O&Os produce substantially more news and public affairs programming than affiliates – nearly 30 percent more, after controlling for relevant factors.**[8]

- In addition, the Commission inquired whether the Cap created incentives for affiliates to preempt.[9]

  - The Joint Commenters have shown that when it comes to interrupting the national programming feed to cover important breaking local news stories, O&Os are if anything *more* likely than affiliates to preempt.[10] Any trivial differential in overall preemption rates between O&Os and affiliates is largely due to affiliate preemptions for economic reasons (*e.g.*, paid programming).[11]

  - Both affiliates and O&Os preempt the network programming feed only with extreme infrequency. **For the entire calendar year 2001, affiliates and O&Os both preempted less than 1 percent of prime time programming *for all purposes*.** The networks' 57 O&O stations preempted an average of 6.8 hours per station for the entire year, while the 651 affiliates preempted an average of 9.5 hours per station for the entire year. Moreover, even though affiliates have the right to preempt "offensive" network programs, they *almost never* do so.[12]

  - **This insubstantial differential in preemption rates (3 hours per year) is no basis for maintenance of a highly intrusive structural ownership regulation.** The infrequency of preemptions is a direct result of the fact that networks have built their entire business plan around producing programming that appeals to the widest possible audience, and that is

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8 *See The Effect of Controlling for Frequency Band (UHF/VHF) When Comparing the Quantity of Local News and Public Affairs Programming on Television Broadcast Network Owned and Operated Stations Relative to Network Affiliate Stations*, Economists Incorporated, May 12, 2003, at 1 (submitted with the *Ex Parte* Letter to the Commission filed by the Joint Commenters, May 12, 2003).

9 *See Notice*, at ¶ 149.

10 *See Preemption By O&Os Compared to Affiliates*, EI Economic Study G, submitted with the Opening Comments of the Joint Commenters, January 2, 2003, at 3.

11 *See id.* at 2.

12 As noted above, EI determined that the average affiliate preempted for content reasons *less than 0.05 hours* (*i.e.*, less than 5 minutes) of prime time programming during the entire year 2001. *See supra,* note 3.

highly profitable to affiliates. Networks have every economic incentive to steer clear of programming that would offend large groups of people, and the overwhelming lack of preemptions only underscores the success of the networks' efforts in this regard.[13]

NASA/NAB Would Convert a Content-Neutral Cap Into a Restriction Uniquely Applicable to O&Os

- Ironically, NASA/NAB attempt to cloak their call to maintain the Cap in the folds of the Commission's 1984 decision to repeal the Cap.[14] NASA/NAB take comfort in the fact that the *1984 Report* generally did not address differences between network-owned and non-network-owned station groups.

- That the *1984 Report* did not distinguish between network-owned and non-network-owned groups is not surprising, however. The report focused on group ownership – rather than on the identity of particular owners – for good reasons:

    - It is wholly inappropriate to base a structural ownership rule on the identity of a particular owner.

    - A rule that uniquely restrains only one type of private owner, while promoting the economic interests of others, is highly suspect. Given that the evidence shows that O&Os are superior performers in the most important measure of localism – output of news and public affairs

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[13] NASA/NAB continue to contend that the Joint Commenters should submit additional data on preemptions. *See NASA/NAB Ex Parte*, at 5. The Joint Commenters have submitted more than enough data to establish that differences in preemption levels are trivial and provide no basis for retention of the Cap. Thus, the Joint Commenters submitted a study on prime time preemptions for the full year 2001. *See Study G*. NASA/NAB offered data on preemptions (for the full day) during the year 2001, but did not dispute the data supplied by the Joint Commenters for prime time – the most important segment of the network broadcast day. *See NASA/NAB Ex Parte*, at 4. The Joint Commenters also demonstrated that affiliate preemption levels do not correlate inversely with the audience reach of O&O groups. *See Affiliate Clearances*, at 18-19. NASA/NAB have submitted no rigorous economic analysis, which controls for other relevant factors, to support their thesis that preemption correlates inversely with the size of O&O groups. These failures are particularly telling since the proponents for retention of the Cap have the burden of demonstrating that it is still necessary in the public interest.

[14] *See Ex Parte* Letter to the Commission, filed by NASA/NAB, May 15, 2003; *see also In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984) (the "*1984 Report*").

programming – maintenance of the Cap would be arbitrary and capricious and contrary to the biennial review provision of the Telecommunications Act of 1996.

- Furthermore, a rule that evaluates one type of owner based on its allegedly inferior editorial judgment raises a host of First Amendment implications. While a truly content-neutral rule would treat all types of owners equally, regardless of their identity, NASA/NAB's justification for the Cap would be based on the networks' editorial views. A rule that focuses on a particular speaker would not be content-neutral, and consequently, would not be entitled to the more lenient standard of review applicable to content-neutral regulations.

- Ultimately, the Joint Commenters have demonstrated that the Commission no longer can justify a Cap that evaluates owners based solely on their size. NASA/NAB do not dispute this conclusion; indeed, in their view, there is no apparent justification for using the Cap to restrain the growth of large affiliate groups. Instead, NASA/NAB have sought to convince the Commission to convert the Cap into a regulation that evaluates owners based on their identity. The Commission should decline the invitation to adopt this unwarranted and illegal approach to ownership regulation.

Conclusion

- The Commission must repeal the Cap unless it finds affirmative evidence justifying the Cap's continued necessity. The primary rationale advanced by those seeking to retain the Cap is that affiliates are needed to protect local viewers.

- By acknowledging that O&Os and affiliates are equally capable of serving local viewers, however, NASA/NAB have narrowed the scope of the debate over the Cap to one issue: whether affiliates are more likely than O&Os to preempt network entertainment programming that the affiliate executives deem to be unsuitable.

- For all of the reasons outlined herein, the Commission should recognize that individual viewers – not affiliate executives – should have the ultimate right to determine what they watch on television. There is no reason for the Commission to allow a structural ownership rule to continue to hamstring one group of owners – networks – based on another group of owners' private belief that they know what is best for every consumer.